

**Exceptional Professional, Inc. d/b/a EPI Construction and Carpenters' District Council of Kansas City and Vicinity Locals 311 and 978 affiliated with United Brotherhood of Carpenters and Joiners of America.** Cases 17-CA-19272, 17-CA-19325, and 17-CA-19385

August 28, 2007

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS KIRSANOW AND WALSH

On August 5, 1998, Administrative Law Judge Mary Miller Cracraft issued a decision in this case. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Union filed a brief in opposition to the Respondent's exceptions.

On September 28, 2001, the National Labor Relations Board issued its Decision and Order,<sup>1</sup> finding that the Respondent committed certain violations of Section 8(a)(1) and (3) of the Act and dismissing an allegation that the Respondent violated Section 8(a)(4) and (1) of the Act. The Board also remanded, for further consideration under *FES*,<sup>2</sup> a complaint allegation that the Respondent violated Section 8(a)(3) and (1) by refusing to consider for hire or to hire 10 applicants.

On January 11, 2002, Judge Cracraft issued the attached decision on remand. The Respondent filed exceptions, the Union filed a brief in opposition, and the Respondent filed a reply brief. Additionally, the Union filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.<sup>3</sup>

<sup>1</sup> 336 NLRB 234.

<sup>2</sup> 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

<sup>3</sup> The Respondent also filed a motion to reopen the record, and the Union filed a response in opposition to the motion. The Respondent's motion seeks to introduce into evidence copies of letters, asserted to constitute job offers, that the Respondent assertedly mailed to 15 alleged discriminatees after issuance of the judge's initial decision in this case. We deny the motion for the same reasons that we denied the Respondent's virtually identical motion in our original decision in this case. 336 NLRB at 234 fn. 2. As we noted there, the letters sought to be introduced, even if found to constitute unconditional offers of employment, would not alter the decision or the requirements set forth in the Order. See *Hedaya Bros., Inc.*, 277 NLRB 942 fn. 1 (1985). The letters are relevant, if at all, only with respect to the remedial aspect of this case. Thus, they may be presented at the compliance phase of this proceeding. See *Challenge-Cook Bros. of Ohio*, 282 NLRB 21, 26 fn. 7 (1986), enfd. 843 F.2d 230 (6th Cir. 1988). If instatement is ultimately required (see fn. 5, *infra*) and the letters are determined to constitute valid offers, the Respondent will not be required to make a second offer of instatement.

We also deny the Respondent's request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's ruling, findings,<sup>4</sup> and conclusions and to adopt the recommended Order.<sup>5</sup>

As noted above, the Board remanded, for further consideration under *FES*, a complaint allegation that the Respondent unlawfully refused to consider for hire or to hire 10 job applicants. To establish a discriminatory refusal-to-hire violation under *FES*, the General Counsel must show that (1) the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, the employer has not adhered uniformly to such requirements, or the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) anti-union animus contributed to the decision not to hire the applicants. Once the General Counsel establishes these three elements,

the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity.<sup>[6]</sup>

In her decision on remand, the judge, applying *FES*, found that the Respondent, a drywall installation contrac-

<sup>4</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, in some of its exceptions, the Respondent contends that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

<sup>5</sup> For the notice designated by the judge as "Appendix E," we will substitute a new notice in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

The instatement and make whole remedy prescribed by the judge shall be implemented in accordance with *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007).

<sup>6</sup> *FES*, above, 331 NLRB at 12.

tor, unlawfully refused to hire two union-affiliated job applicants and refused to consider eight others. Specifically, the judge found that the General Counsel met his initial burden as to the refusal-to-hire allegations for all 10 applicants, but that the Respondent met its rebuttal burden of establishing that it would not have hired 8 of the applicants even in the absence of their union activity or affiliation.

The judge found that eight of the employees whom the Respondent hired to fill its job openings—employees Argaez, Cen, Herrera, Rivero, Varguez, Garcia, Archer, and Self—had superior qualifications to those of the union-affiliated applicants. Thus, employees Argaez, Cen, Herrera, Rivero, Varguez, Garcia, and Archer were well known to Stewart, the Respondent’s president, for their drywall work as subcontractors for the Respondent on prior projects, and Stewart had been able to assess their drywall work through their participation in these projects. Additionally, these employees had been working steadily in drywall for at least 1 year before the Respondent hired them. Archer also had been an employee of the Respondent previously, and the Respondent had first-hand knowledge of his work history. Employee Self was highly recommended by employees of the Respondent for his drywall expertise, and the Respondent had recruited him for some time prior to securing him as an employee.

The judge found that these eight employees’ *drywall* qualifications—precisely the type of work that the Respondent performed—and their “immediate, observed, steady drywall employment” made them superior applicants to the discriminatees, who were journeymen carpenters. Thus, the judge found that the Respondent established that, even if the discriminatees had not engaged in union activity, the Respondent would have hired these eight employees rather than the alleged discriminatees. We agree.

Our dissenting colleague contends that the judge’s finding as to these eight discriminatees cannot stand because, when assessing whether the General Counsel had met his initial *FES* burden, the judge found, among other things, that the Respondent did not uniformly adhere to its hiring criteria, which the judge found were pretextually applied. In our view, however, the judge’s finding in this regard was mistaken. The Respondent did uniformly adhere to its hiring *criteria*. It merely deviated from its usual *procedures* for determining whether applicants satisfied those criteria.

According to Stewart’s testimony, the Respondent tried to hire employees who had drywall experience, had been working in drywall on a regular basis, and had a steady employment history. Those were the Respon-

dent’s hiring criteria. Stewart further testified that he used employment applications to determine whether employees possessed the requisite experience and training, and he requested that applicants list personal references. Finally, Stewart relied on interviews to determine whom to hire. Those were the Respondent’s procedures for measuring applicants against its criteria.

The judge, who specifically found that the Respondent’s hiring criteria *were not* themselves pretextual, concluded that Respondent did not uniformly adhere to its hiring criteria as to 10 of the 13 individuals placed on the payroll between June 30 and July 27, 1997—including employees Argaez, Cen, Herrera, Rivero, Varguez, Garcia, Archer, and Self—because few of these 13 individuals completed an application, gave personal references, or had interviews. In other words, the judge confused the Respondent’s usual procedures for applying its criteria with the criteria themselves. In her analysis of the Respondent’s rebuttal case under *FES*, the judge found that the just-named applicants had “immediate, observed, steady drywall employment.” That is, they met the Respondent’s hiring criteria.

We agree with our colleague, however, that the General Counsel met his initial burden under *FES* by showing that the union applicants had experience or training relevant to the announced or generally known requirements of the positions for hire. The other two elements of the General Counsel’s initial case were also shown.<sup>7</sup> The General Counsel having met his burden, the judge properly applied *FES* and analyzed whether the Respondent had met its rebuttal burden of showing that, even if the discriminatees had not engaged in union activity or been affiliated with the Union, the Respondent still would not have hired them. One of the ways that the Respondent may satisfy this burden is by showing, in the words of *FES*, “that others (who were hired) had superior qualifications, and that it would not have hired [the discriminatees] for that reason even in the absence of their union support or activity.”<sup>8</sup> The judge found that the Respondent made this showing here.

Although the Respondent did not adhere to all of its hiring procedures when seeking to identify experienced

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<sup>7</sup> We agree with our dissenting colleague as to the General Counsel’s initial burden under *FES*. The appropriate test under the second prong of the General Counsel’s initial burden is whether the applicants had the relevant experience or training *or*, if not, whether the employer did not uniformly adhere to those requirements or applied them in a pretextual way. The Board required the judge to make findings on both parts of the test to preclude a need for a further remand in the event that the Board were to disagree with the judge’s finding as to one. The judge apparently misunderstood the remand order to mean that the General Counsel had to show that both parts of the test were met.

<sup>8</sup> *FES*, above, 331 NLRB at 12.

drywall workers to hire, its actual hiring shows that it did hire applicants who had been regularly working in drywall. All but one of the 13 individuals whom the Respondent hired between June 30 and July 27 had drywall experience.<sup>9</sup> Additionally, while Argaez, Cen, Herrera, Rivero, Varguez, Garcia, Archer, and Self did not submit applications or give references, the Respondent, as noted above, was familiar with their work as subcontractors (and, in Archer's case, as an employee) and Self had been recruited by the Respondent based on the recommendations of current employees.<sup>10</sup>

Thus, even though the Respondent did not always follow its usual procedures, its lack of uniformity in this regard did not mean that, given a choice between applicants who had "immediate, observed, steady drywall employment" and others, the Respondent was indifferent or would hire applicants at random. As set forth by the judge, the eight employees whom the Respondent hired had substantial, recent experience in doing drywall work. Moreover, as described above, the Respondent had directly observed the work of all but one of them, and the other came highly recommended by current employees of the Respondent. Given these employees' drywall experience and the fact that the work of all but one of them had been directly observed by the Respondent, we agree with the judge that the Respondent has established that these eight employees were superior applicants and that the Respondent would have hired them rather than the discriminatees even in the absence of the discriminatees' union activity and affiliation.

Our dissenting colleague says that the Respondent "skewed" the overall process so as to prefer nonunion applicants, and "grudgingly" accepted applications from Union adherents. Accepting these quoted terms arguing, they support our agreement that the General Counsel met his initial burden of proof. However, the judge found, and we agree, that the Respondent then met its burden of showing that those selected had qualifications superior to those of the alleged discriminatees (not simply, as our colleague says, that those selected were qualified). Thus, we cannot agree that those quoted terms establish a violation.

<sup>9</sup> Employee Steve Rucker had no drywall experience, but his father was an employee of the Respondent.

<sup>10</sup> In view of the Respondent's familiarity with these individuals' work, we understand the judge's statement that there was little evidence regarding their qualifications and training as indicating merely that they did not submit, and the Respondent did not introduce into evidence, applications or other documentation formally setting forth their qualifications and training. Clearly, based on the Respondent's familiarity with these individuals' work, the Respondent knew that they were well qualified and had substantial experience in performing the type of work for which the Respondent hired them.

In sum, the judge found, and we agree, that the General Counsel met his initial burden. The burden then shifted to the Respondent. We conclude, as did the judge, that the Respondent would have chosen the persons hired because of their superior drywall qualifications, even absent the union affiliation and activity of the nonchosen applicants.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Exceptional Professionals, Inc. d/b/a EPI Construction, Nixa, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the attached notice for that of the administrative law judge.

MEMBER WALSH, dissenting in part.

I join in all aspects of the majority's decision, with the exception of its adoption of the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) by refusing to hire 8 of the 10 union-affiliated job applicants. That finding is the apparent result of our misstatement of the appropriate test in the remand order, and it is fundamentally inconsistent with *FES*.<sup>1</sup>

Under *FES*, in a hiring discrimination case, the General Counsel has the initial burden of showing: (1) that the respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, *or, in the alternative*, that the employer has not adhered uniformly to such requirements, or that the requirements themselves were pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. If the General Counsel satisfies that burden, the burden shifts to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

In this case, the judge found that the General Counsel established the first and third elements of its initial burden: that the Respondent was hiring when the 10 union-affiliated applicants applied for work and that antiunion animus contributed to the Respondent's decision not to hire them. Regarding the second element of the test, the judge found that all of those applicants had experience or training relevant to the announced or generally known requirements of the positions for hire *and* that the Respondent had not adhered uniformly to those require-

<sup>1</sup> 331 NLRB 9 (2000), *enfd.* 301 F.3d 83 (3d Cir. 2002).

ments. With respect to the second part of that test, the judge specifically found that the Respondent applied one set of criteria to the union-affiliated applicants and a different set to other applicants. In other words, as the judge stated, the Respondent's hiring criteria were "pretextually applied."

In making that finding, the judge correctly observed that *FES* set forth that element of the test—whether the applicants met the announced or generally known job requirements *or* that the employer had not uniformly adhered to those requirements—in the disjunctive, but that the Board's decision remanding the case to her stated it in the conjunctive. "In an excess of caution," the judge proceeded "as instructed . . ." Based on those findings, the judge found that the General Counsel met his initial burden, and that the burden therefore shifted to the Respondent to show that it would not have hired those applicants even in the absence of their union affiliation.

The judge then found that the Respondent met its rebuttal burden as to 8 of the 10 applicants, because it established that it hired 8 other applicants who possessed stronger qualifications than those of any of the union-affiliated applicants. Accordingly, the judge concluded that the Respondent violated Section 8(a)(3) and (1) only by refusing to hire two of the union applicants.<sup>2</sup>

Although the judge correctly found a violation regarding the Respondent's refusal to hire two of the applicants, her finding concerning the remaining eight cannot stand. The judge found that the Respondent applied its hiring criteria pretextually, but she then permitted the Respondent to avoid liability by showing that it would have refused to hire 8 of the 10 union applicants because it hired 8 other applicants who possessed stronger qualifications. That finding is illogical.<sup>3</sup> Having found that

<sup>2</sup> The judge did not specify which 2 of the 10 discriminatees were unlawfully refused employment; the judge left that determination to the compliance stage of the proceeding.

<sup>3</sup> The majority contends that the Respondent did not discriminatorily apply its hiring *criteria*, as the judge found, but that it failed to uniformly adhere to its hiring *procedures* for determining whether the applicants satisfied those criteria. The majority then argues that, because the Respondent's application of the hiring criteria was nondiscriminatory, its determinations that the nonunion applicants were more qualified than the union applicants was made without regard to union affiliation. That argument does not withstand scrutiny. Whether the Respondent discriminatorily applied its hiring criteria, or, alternatively, whether it discriminatorily applied its hiring procedures to determine whether applicants met those criteria, the fact remains that the Respondent skewed the overall process to give preferential treatment to nonunion applicants. Although the nonunion applicants who were hired may have been qualified for the positions for which they applied—and it is difficult to tell, as many of them did not submit applications, furnish references, or have interviews—it is more likely than not that the Respondent viewed their qualifications more favorably than those of the

Respondent acted with antiunion animus and that it applied its announced hiring criteria pretextually, the inquiry was over: at that point, it was no longer possible for the Respondent to mount a defense based on a neutral application of those same criteria.<sup>4</sup> Accordingly, the judge should not have found that the Respondent acted lawfully in hiring the eight nonunion applicants, based on their allegedly superior credentials.

I would reverse the judge's finding that the Respondent met its rebuttal burden as to any of the refusal-to-hire allegations, and would therefore find that the Respondent's refusal to hire all 10 of the union-affiliated applicants violated the Act.

#### APPENDIX E

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to hire employees because of their activity on behalf of or membership in Carpenters' District Council of Kansas City and Vicinity Locals 311 and 978 affiliated with United Brotherhood of Carpenters and Joiners of America (the Union).

WE WILL NOT refuse to consider applicants for employment because of their activity on behalf of or membership in the Union.

union applicants, whose applications it accepted only grudgingly and who were otherwise excluded from the hiring process, consistent with the Respondent's strong preference for hiring nonunion applicants. In the circumstances, it cannot be said that the Respondent's overall evaluation of the applicants was nondiscriminatory and gave no regard to union affiliation, as the majority suggests.

<sup>4</sup> The same principle applies in pretext cases decided under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982): "Where it is shown that the reason or reasons given by the Company for its adverse action were a pretext—that is that the reasons either do not exist or were not in fact relied upon—it necessarily follows that the Company has not met its burden and the inquiry is logically at an end." *Overnite Transportation Co.*, 343 NLRB 1431, 1454 (2004), and cases cited.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL offer reinstatement to two individuals we discriminatorily failed and refused to hire, whose identity will be determined in a Board compliance proceeding, in the positions for which they applied or, if those positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed had we not unlawfully refused to hire them.

WE WILL make these individuals whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL consider the remaining discriminatees, whose identity will be determined in the compliance proceeding, for future job openings in accord with nondiscriminatory criteria, and WE WILL notify them, the Union, and the Regional Director for Region 17 of future openings in positions for which the discriminatees applied or substantially equivalent positions.

WE WILL remove from our files any reference to our unlawful refusal to hire or to consider for hire the individuals identified in the compliance proceeding as stated above, and WE WILL notify each of them in writing that this has been done and that the refusal to hire them or consider them for hire will not be used against them in any way.

EXCEPTIONAL PROFESSIONAL, INC. D/B/A EPI  
CONSTRUCTION

*Stanley D. Williams, Esq.*, for the General Counsel.

*Donald W. Jones, Esq. (Hulston, Jones, Gammon & Marsh)*, of  
Springfield, Missouri, for the Respondent.

*Michael T. Manley, Esq. (Blake & Uhlig)*, of Kansas City, Kansas,  
for the Charging Party.

#### DECISION ON REMAND

##### STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This is a remand pursuant to *FES*, 331 NLRB 9 (May 11, 2000).<sup>1</sup> In *FES* the Board restated, inter alia, the elements that the General Counsel must establish in order to meet the initial burden in refusal-to-hire and refusal-to-consider for hire cases. In light of *FES*, on September 28, 2001, the Board remanded a portion of the instant case for further consideration of the complaint allegations that the Respondent unlawfully refused to consider for hire or to hire 10 applicants. *EPI Construction*, 336 NLRB 234 (2001). The Board requested that on remand, further considera-

<sup>1</sup> Following a hearing in November 1997 and March 1998, on August 5, 1998, I issued a decision in this case.

tion be given to

(1) whether there were available openings at the time that the alleged discrimination occurred; (2) the number of such available openings; and (3) whether the applicants had training and/or experience relevant to the announced or generally known requirements of the openings and whether those requirements were not uniformly adhered to or were either pretextual or pretextually applied. The judge may, if necessary, reopen the record to obtain evidence required to decide the case under the *FES* framework.

*EPI Construction*, 336 NLRB at 235. The Board specifically noted that its remand allowed for consideration of other factors as well.<sup>2</sup>

On the entire record, including my observation of the demeanor of the witnesses, and after considering the original and additional briefs filed by counsel for the General Counsel, counsel for the Charging Party, and counsel for the Respondent, I make the following

#### FINDINGS OF FACT ON REMAND

##### *A. There were Available Openings at the Time of the Alleged Discrimination*

*The date of the alleged discrimination is June 30, 1997, and thereafter.* Thus, the complaint alleges that about June 30, 1997, Respondent refused to consider for hire or to hire employee applicants Jim Carsel, Larry Collinsworth, Roger Hensley, Bob Hum, John Duncan, Tom McFarland, Mike Joyce, Shelley Williams, Steve Wilson, and Matt Rausch. In my original decision, 336 NLRB 234, 250 (2001), I found that on June 30, 1997, at about 10 or 10:30 a.m., Carsel and the other alleged discriminatees completed job applications and submitted them to Respondent. Stewart said he would not get to these applications for 2 weeks. He said he would call.

*On June 30, 1997, or shortly thereafter Respondent had available openings.* In my original decision at 336 NLRB at 250, I found that although Respondent's president, Fred Stewart, initially told Carsel that Respondent was not taking applications on June 30, 1997, when Carsel countered that Gerald Hill, Job Supervisor for General Contractor Dalton Killinger, told Carsel that Respondent was behind on the Dalton Killinger project, Stewart replied, "fine," and handed job applications to all of the alleged discriminatees. I further found that Respondent hired at least 13 employees shortly after June 30, 1997, and additionally utilized 4 employees from its general contractor between June 25 and July 30, 1997. 336 NLRB 251. Based upon this evidence, I conclude that Respondent had available openings on June 30, 1997, or shortly thereafter.<sup>3</sup>

<sup>2</sup> Following a conference call held on November 9, 2001, all counsel participating, I determined that the record was sufficient to decide the case under the *FES* framework. A date was set for briefing of the issue on remand. All counsel filed additional briefs on remand. A copy of this ruling on remand is attached as "Appendix A."

<sup>3</sup> Respondent argues that its use of four Dalton Killinger employees to perform carpentry work cannot be viewed as job openings for which the alleged discriminatees could be considered. I agree that Respondent's arrangement to utilize Dalton Killinger employees began on June 25, 1997, and therefore predates the alleged discriminatees' appli-

*B. There were at Least 13 Available Job Openings on or Shortly After June 30, 1997*

Respondent is a sheet rock installation contractor engaged in the construction industry. Around the time the alleged discriminatees applied for employment, Respondent's projects included the Carthage Elementary School, Columbian-Fairview Elementary School, Santa Fe School, Tomahawk School, Mills Anderson Justice Center, College Heights Christian School, Remington Country Club, Fairfield Inn, Budgetel Inn, Hickory County School, and the Carthage Humane Society.

Respondent generally allowed individuals to complete application forms before and after June 30, 1997. Accordingly, Jonathon Hackenberg testified that he was allowed to complete an application on July 3 but was requested to postdate the application to June 25.

Moreover, Respondent's general contractor testified that Respondent was behind schedule on the Carthage Elementary School job. This contractor assigned four of its employees to perform Respondent's work of hanging drywall and installation of acoustical ceiling materials in order to avoid paying liquidated damages. Respondent was charged for the time these employees spent performing Respondent's work between June 25 and August 12, 1997.

This evidence indicates that Respondent was taking applications and needed assistance. There is no evidence regarding any specific length of time which Respondent maintained applications for active consideration. Excluding those employees hired primarily to perform plastering work,<sup>4</sup> Respondent hired at least 13 individuals to perform carpentry work between June 30 and July 27, 1997. Appendix B sets forth the complete information regarding Respondent's hiring during this period. The record conclusively demonstrates that Respondent was hiring at the time the alleged discriminatees applied for work.

*C. The Applicants had Training and/or Experience Relevant to the Announced or Generally Known Requirements of the Openings*

The third requirement on remand is phrased in the conjunctive. Accordingly, the Board has requested on remand that I determine

Whether the applicants had training and/or experience relevant to the announced or generally known requirements of the openings and whether those requirements were not uniformly adhered to or were either pretextual or pretextually applied.

*EPI Construction*, 336 NLRB at 235. I note that in *FES*, supra, 331 NLRB 912, the Board phrased the General Counsel's burden disjunctively, inter alia as follows:

(2) that the applicants had experience or training relevant to the announced or generally known requirements of the posi-

cations for employment with Respondent. I find that the use of these employees supports a finding that Respondent was short-handed and needed employees to meet its construction deadlines.

<sup>4</sup> Plastering work, although it may technically qualify as "carpentry" work, was not specifically sought by any of the alleged discriminatees. Carsel agreed that a separate union represented plasterers and he did not view Respondent's hiring of plasterers as an act of discrimination against the Union.

tions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination. . . .

In an excess of caution, I will make the findings as instructed on remand by the Board.

There is no evidence of any employment announcements or advertisements listing specific job requirements. Respondent explained that it preferred to hire applicants with past drywall experience and steady employment, among other criteria. The record evidence regarding the qualifications conveyed to Respondent by the alleged discriminatees is limited to statements made by Carsel, the only 1 of the 10 to actually speak to Stewart, and to the job applications submitted by the applicants. The applicants were wearing union jackets, caps, and shirts. Carsel told Stewart that all of the individuals would like to make application to go to work for Respondent. He added that these individuals were qualified carpenters, stating, "[The applicants] were all journeymen, and we'd like to, you know, we'd work for his wages, his terms, his benefits, and we'd do him a good job. And if hired, we would try to organize his company."

The alleged discriminatees uniformly listed training and/or experience relevant to the generally known requirements of the openings. Thus, each of the alleged discriminatees listed past experience and training in carpentry. Appendix C sets forth this information in detail.

*D. Respondent did not Uniformly Adhere to its Hiring Criteria*

Respondent explained that it attempted to hire employees with past drywall experience. In many instances, Respondent paid at or near the prevailing wage for journeyman carpenters, \$17.51 per hour, to individuals placed on the payroll between June 30 and July 27, 1997. From this rate of pay, I infer that Respondent wanted employees who were capable of rapid, competent drywall framing and hanging.

Stewart testified that he utilized employee applications to determine whether employees possessed the requisite experience and training to work for him. He also preferred to hire individuals with a steady employment history. Stewart requested that applicants list personal references. Finally, Stewart relied on an interview to determine which employees to hire. Stewart explained that Respondent performed specialized carpentry and he was looking for individuals who had been working in drywall on a regular basis, rather than sporadically. However, Stewart's past practice, as set forth in my prior decision, indicates that on at least one occasion he did not require drywall experience at all. Rather, Stewart hired one applicant with no relevant training and hired another applicant with only one month of relevant training. As I have previously concluded, Respondent did not uniformly apply its hiring requirements. See 336 NLRB 234, 251. ("Rather, the evidence establishes that different criteria were utilized for other applicants than for the batch applicants.")<sup>5</sup>

I conclude that Respondent did not uniformly adhere to its hiring criteria as to 10 of the 13 individuals placed on the pay-

<sup>5</sup> I do not find that Respondent's hiring criteria were pretextual. Rather, they were pretextually applied.

roll between June 30 and July 27. Few of these individuals completed an application, gave personal references, or had interviews. There is little evidence regarding the qualifications or training of these individuals. Appendix D sets forth the relevant names and the manner in which Respondent adhered or failed to adhere to its hiring criteria.

*E. Antiunion Animus Contributed to Respondent's Decision not to Hire the Applicants*

In my prior decision, I found various violations of Section 8(a)(1) and (3). These findings were affirmed by the Board<sup>6</sup> and support a finding that antiunion animus contributed to the decision not to hire the applicants. I note additionally that Carsel told Stewart that if any of the alleged discriminatees were hired, they would attempt to organize Respondent's employees. Accordingly, Respondent's defense, that it hired 16 other employees who had worked for known unionized companies, or who had a recent history of union membership, and assumed or knew that these employees belonged to the Union, is not persuasive. Respondent also relies on the fact that Stewart was himself a union member in the past, Respondent has a past record free of unfair labor practices, and Respondent has signed union agreements in the past. As the Board has noted, there is a significant difference between past union affiliation and a stated intent to organize. *H. B. Zachry Co.*, 332 NLRB 1178, 1183 (2000), relying on *Flour Daniel Inc.*, 311 NLRB 498, 500 (1993), *enfd. in part, remanded in part* 161 F.3d 953 (6th Cir. 1998). In light of Carsel's announcement that the applicants would attempt to organize employees if hired, Respondent's defense fails.

*F. Respondent's Burden*

Based upon the above findings, the General Counsel has met the initial burden in the discriminatory refusal-to-hire violation. The burden now shifts to Respondent. *FES* instructs that Respondent must show that it would not have hired the applicants even in the absence of their union activity or affiliation. *FES* continues,

If the respondent asserts that the applicants were not qualified for the positions it was filing, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. In sum, the issue of whether the alleged discriminatees would have been hired but for the dis-

crimination against them must be litigated at the hearing on the merits.

*FES*, 331 NLRB 9, 12.

Respondent has not presented any evidence that the applicants did not possess the experience and training that the positions required. Rather, the sole relevant evidence on the record as a whole, i.e., the applications forms themselves as well as Carsel's comments to Stewart on June 30, 1997,<sup>7</sup> indicate that the alleged discriminatees were qualified for the positions Respondent was filling. They were journeymen union carpenters, according to Carsel's statement to Stewart, and they listed experience in carpentry on their applications.

Stewart testified that although he hired some employees shortly after June 30, 1997, in his view, the employees he hired were better qualified than the alleged discriminatees. Stewart testified that he did not eliminate any of the alleged discriminatees because they did not list personal references or provide dates for their prior employment.

Respondent's evidence, as set forth in Appendix D, indicates that one of those hired, Dave Archer, was a prior employee of Respondent's. Six employees, Miguel Arguez, Enrique Cen, Vladimir Herrera, Fabian S. Rivero, Miguel Varguez, and Miguel Garcia, were well known to Respondent for their drywall work as subcontractors for Stewart on other projects. Byron Self, an eighth employee hired during the relevant period, was highly recommended as an excellent drywall employee by employees of Respondent. Respondent had been trying to hire Self for some time prior to June 30, 1997. I conclude that these eight applicants were superior applicants to the alleged discriminatees.

As to Archer, Respondent was familiar with his work during his prior tenure with Respondent. Archer was a known prior employee with a work history of which Respondent had first-hand knowledge. Similarly, Arguez, Cen, Herrera, Rivero, Varguez, and Garcia worked since 1996 hanging drywall for Stewart as subcontractors in apartment buildings. It must be inferred from the record as a whole, that Stewart was able to assess their steady drywall work through this employment relationship. These six employees had been working steadily in drywall for at least 1 year prior to Respondent's hiring them. Finally, as to Self, Stewart's testimony establishes that Self came highly recommended specifically for his expertise in drywall. Based upon these qualifications which are specific to drywall, the work which Respondent was performing at the time, I find these applicants superior to the alleged discriminatees. This is not to take away from the excellent qualifications of the alleged discriminatees who, according to Carsel, were journeymen carpenters. There can be no doubt that these applicants possessed substantial training and experience and could have performed the drywall work. However, because the eight who were hired had immediate, observed, steady drywall em-

<sup>6</sup> The Board reversed my finding that Respondent violated Sec. 8(a)(4) and (1) by establishing a grievance and arbitration procedure restricting the rights of employees to use the NLRB processes because there was insufficient evidence to support a violation. However, the Board affirmed my findings regarding informing employees that unionization would be futile, creating the impression of surveillance, promulgating a discriminatory no-solicitation rule, interrogating employees, threatening employees with layoff, discriminatory promulgation of a drug and alcohol abuse and testing policy, requiring employees to predate application in order to avoid hiring union applicants and laying off and suspending employees because of their union activities or membership.

<sup>7</sup> Testimony regarding the qualifications of each applicant was elicited from Carsel. However, there is no evidence that Carsel's assessments of each applicant were provided to Respondent as part of the hiring process. Accordingly, I have disregarded this information as irrelevant.

ployment, I find that they were superior applicants.

Two others who were hired without benefit of uniform application of Respondent's hiring criteria did not have superior qualifications or past known job experience with Respondent and were not well known to Respondent for their drywall expertise or experience. These two are Greg and Steve Rucker. Stewart acknowledged that Greg Rucker worked as a superintendent from 1992 to 1997 at National Specialties, where commonly superintendents did not work with their tools. Stewart testified that Greg Rucker stated during his interview that he had been using his tools to complete a project. However, this does not convince me that he had superior qualifications to those of the applicants. Steve Rucker had no experience in drywall. As to those vacancies, Respondent has not shown that it would not have hired the alleged discriminates because they did not possess the specific qualifications for the positions even in the absence of their union support or affiliation. A compliance proceeding may be utilized to determine which of the alleged discriminates would have been hired for those two vacancies. *FES*, 331 NLRB 9, 14 (2000).<sup>8</sup>

*G. Respondent Excluded the Applicants from the Hiring Process and Antiunion Animus Contributed to the Decision not to Consider the Applicants for Employment*

In my prior decision, I found that Respondent excluded the alleged discriminates from the hiring process and that antiunion animus contributed to the decision not to consider them in the hiring process. It is undisputed that during that time, other employees were hired who did not complete job applications. It is also undisputed that Stewart told the applicants it would take him 2 weeks to get back to them. After consideration of the factors outlined above, I find no reason to alter my conclusion that Respondent excluded the applicants from the hiring process and antiunion animus contributed to the decision not to consider the applicants for employment.<sup>9</sup>

CONCLUSIONS OF LAW

1. By discriminatorily refusing to hire two of the alleged discriminates, Respondent has violated Section 8(a)(1) and (3) of the Act within the meaning of Section 2(6) and (7) of the Act.

2. By discriminatorily refusing to consider the ten alleged discriminates for employment, Respondent has violated Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate

<sup>8</sup> Respondent's motion to reopen the record on remand to receive evidence regarding "unconditional" offers of instatement made to each of the alleged discriminates between the period August 12 to September 15, 1998, is denied. Such offers are not relevant at this stage of the proceedings.

<sup>9</sup> In *Sommer Awning Co.*, 332 NLRB 1318, 1319 fn. 4 (2000), the Board found it unnecessary to decide the merits of a refusal-to-consider violation because the remedy for such a violation was subsumed within the broader remedy of the refusal-to-hire violation. This observation would appear to be accurate in the particular facts of that case—where there were not more applicants than there were available openings.

ate the policies of the Act.

Having discriminatorily failed to hire two of the alleged discriminates, Respondent shall cease and desist and offer the discriminates instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and make them whole for losses sustained by reason of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). This order is subject to the compliance stage to determine which of the ten alleged discriminates would have filled the two vacancies.

Having failed to consider for hire the 10 alleged discriminates, Respondent shall cease and desist and place the discriminates in the position they would have been in, absent discrimination, for consideration for future openings, to consider them for the openings in accord with nondiscriminatory criteria, and notify the discriminates, the Union, and the Regional Director for Region 17 of future openings in positions for which the discriminates applied or substantially equivalent positions. Because the number of applicants is greater than the number of available openings, if job openings occur after the beginning of the hearing, the General Counsel must initiate a compliance proceeding to determine whether the remaining discriminates would have been selected in the absence of Respondent's discriminatory failure to consider them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>10</sup>

ORDER

The Respondent, Exceptional Professional, Inc. d/b/a EPI Construction, Nixa, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily failing to hire employees because of their union activity or membership.

(b) Discriminatorily failing to consider for hire applicants because of their union activity or membership.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer instatement to two alleged discriminates, whose identity is to be determined in the compliance stage of this proceeding, to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions and make them whole for any loss of earnings and other benefits sustained by reason of the discrimination against them, in the manner set forth in the remedy section.

(b) Consider on a nondiscriminatory basis the remaining discriminates for future job openings that arise subsequent to the beginning of the hearing and notify the discriminates, the Un-

<sup>10</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ion, and the Regional Director for Region 17 of such openings in positions or substantially equivalent positions for which the discriminates applied, in the manner set forth in the remedy section.

(c) Remove from its files any reference to unlawful refusal to hire two discriminatees, whose identity is to be determined in the compliance stage, and notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(d) Remove from its files any reference to unlawful refusal to consider for employment the remaining discriminatees, whose identity is to be determined in the compliance stage, and notify them in writing that this has been done and that the refusal to consider them will not be used against them in any way.

(e) Preserve and, within 14 days of a request, provide at the office designated by the Board or its agents, a copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

(f) Within 14 days after service by the Region, post at its place of business in Nixa, Missouri, copies of the attached notice marked "Appendix E."<sup>11</sup> Copies of the Notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 30, 1997.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

#### APPENDIX A

##### ORDER ON REMAND

On September 28, 2001, this case was remanded "for further consideration [regarding] the complaint allegation that the Respondent unlawfully refused to consider for hire or to hire 10 applicants. . . ."<sup>11</sup> Specifically, the Board noted that on May 11, 2000, it issued *FES* 331 NLRB 9, setting forth a framework for

<sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>1</sup> *EPI Construction*, 336 NLRB 234 (2001).

analysis of refusal-to-hire and refusal-to-consider allegations. The instructions on remand continued:

We have decided to remand this case to the judge for further consideration in light of *FES*, including, but not limited to determination of: (1) whether there were available openings at the time that the alleged discrimination occurred; (2) the number of such available openings; and (3) whether the applicants had training and/or experience relevant to the announced or generally known requirements of the openings and whether those requirements were not uniformly adhered to or were either pretextual or pretextually applied. The judge may, if necessary, reopen the record to obtain evidence required to decide the case under the *FES* framework.<sup>2</sup>

Thereafter, all parties participated in a conference call held on November 9, 2001, to discuss procedures on remand. Counsel for the General Counsel asserted that the record made in November 1997 and March 1998 was sufficient and there was no need to reopen the record to receive further evidence. Counsel for the Charging Party stated that he agreed with counsel for the General Counsel regarding the basic elements of *FES*. However, he had some concern that the remedy of reinstatement and backpay, sought by the General Counsel, might require further evidence to the extent General Counsel sought a remedy based on openings arising after the trial on the merits had begun.<sup>3</sup> Counsel for Respondent opined that there was no need to reopen the record because "it would not do us any good under the circumstances." This comment was made in the context of counsel's argument that undisputed evidence introduced by Respondent at the initial trial on the merits had been ignored.

Based upon the positions of the parties as well as the holding in *FES* and the terms of the Board's remand herein, I have determined that the record is sufficient to decide the case under the *FES* framework. Briefs on remand shall be submitted on Friday, December 14, 2001. To the extent the parties disagree with my decision not to reopen the record, they are instructed to brief that issue, specifically setting forth what evidence they would seek to introduce were the record reopened.

#### APPENDIX B

Between June 30, 1997, and the end of the payroll period of July 7 to July 13, 1997, 17 new names appeared on Respondent's payroll. At least 13 of these individuals primarily performed carpentry work? Respondent agrees that the rate of \$17.51 per hour was a journeyman carpenter rate. Respondent paid its newly hired employees at or near this rate. From this, I infer that Respondent wanted skilled employees who could work competently and rapidly.

- Dave Archer first appeared on the payroll during the period July 7 to July 13. He was compensated at a rate of \$17.51 and worked 47 hours during that pay period. There is no application form in evidence for Archer.
- Miguel Arguez first appeared on the payroll during the

<sup>2</sup> *EPI Construction* supra at 235.

<sup>3</sup> See *FES*, supra at 239.

period July 7 to July 13. Respondent asserts that he was hired on June 30, 1997, as a helper at \$10 per hour. However, the payroll indicates that Argaez started at a rate of \$16.05 and worked 38 hours that pay period. Respondent contends that Argaez, Cen, Herrera, Rivero, Varguez, and Garcia were "hired" long before June 30, 1997, when the alleged discriminatees applied for work. However, there is no evidence that this is so. Respondent relies on a date in April 1997 when Gabriel May was hired. However, Stewart was unable to tie the hiring of these six employees to the date when May was hired, sometime in April. These employees all began working during the week of July 7 or later. I find that the dates which they appeared on the payroll are much more reliable than the dates in other documents generated by Respondent. There are no applications for these employees. Stewart's vague testimony regarding plans to hire them predating June 30, 1997, was unpersuasive. Accordingly, I conclude these six individuals were hired after June 30, 1997.

- Enrique Cen first appeared on the payroll during the period July 7 to July 13. He is listed as starting at a rate of \$16.05 and working 16 hours during that pay period.
- Quinten Carter, Sebastian Carter, Ted Carter, and Robert Carter first appeared on the payroll during the period July 7 to July 13, 1997. According to Respondent, the four Carters were hired on June 30, 1997, as journeyman plasterers. They spent about 10 to 20 percent of their time performing interior framing, which is carpentry work.
- Vladimir Herrera (sometimes listed as Vladimir, H.) first appeared on the payroll during the period July 7 to July 13. He is listed as starting at a rate of \$16.05 and working 40 hours during that pay period.
- Fabian. S. Rivero is listed as beginning employment during the period July 7 to July 13, 1997, at a rate of \$18.32 and working 32 hours on each of two different projects during that pay period.
- Greg and Steve Rucker dated their applications for work June 3, 1997. Respondent's set up sheets for new employees to list their date of hire as June 30, 1997. I discredit both the date of application and the date of hire on these documents as unreliable and inconsistent with a full reading of these individuals' applications. Thus, Greg Rucker stated that he worked for National Specialties from December 1992 until July 1997. Under reason for leaving, he stated, "came to work here!" Steve Rucker stated that he worked for National Specialties until July 1997. Both individuals first worked during the payroll period July 7 to 13, 1997. Greg Rucker's starting rate of pay was \$17.32. Steve Rucker's starting rate of pay was \$15.40. Both performed carpentry work for Respondent. I find these individuals were hired after June 30, 1997.
- Miquel Varguez first showed up as an employee during pay period July 7 to July 13, 1997, at a rate of \$16.05 working 15 hours.
- M. Williams began working during pay period July 7 to July 13, 1997, at a rate of \$15.18 for 40 hours. Respondent contends that the record indicates that Williams was hired prior to June 30, 1997. In fact, Williams' employee

set up sheet shows a hire date of June 25, 1997. His application for employment is dated June 1, 1997, on the front and July 1, 1997 by his signature. The front date, "June 1, 1997" shows clear tampering or rewriting. Williams' 1-9 form is also dated July 1, 1997. For these reasons, I find that the date when Williams actually began working is more reliable. I discredit these other dates and find that Respondent hired Williams in July 1997.

New employees continued to arrive. For instance, during payroll period July 14 to July 20, 1997,

- Jonathan T. Hackenberg, who submitted an employment application on July 3, 1997,<sup>2</sup> first worked during payroll period July 14 to July 20, 1997. Hackenberg is listed at a rate of \$18.32 per hour and worked 46 hours during that pay period.
- Danny Joiner first appeared on the payroll during the period July 14 through 20, 1997, at a rate of \$16.05, working 16 hours.
- Miguel Garcia appeared on the payroll during the period July 14 through 20, 1997, at a rate of \$16.05 and worked 58 hours.

During payroll period July 21 to 27, 1997, Byron Self first appeared at a rate of \$17.51, working 37 hours.

#### APPENDIX C

Alleged discriminatee James D. Carsel applied for any position starting anytime with "salary desired," an open issue. He noted his special skills as carpentry and union organizing and listed his trade school as Carpenters #311. Carsel listed his job experience from 1986 to 1990 with R. E. Smith Construction; from 1990 to 1995 with Dalton Killinger Construction; and from 1995 to 1997 as an organizer with the Union. He listed two personal references. Although Carsel's carpentry and general drywall experience was not recent, in that he had either been a superintendent (1986-1995) or a union organizer (1995-1997), Carsel had the training and experience relevant to the generally known requirements.

Larry Dale Collinsworth, alleged discriminatee, stated on his application that he wanted a job as a carpenter, was available immediately, and would work for Respondent's wages. He listed vocational—technical training for 2 years in a machine shop and listed special skills as, "all phases of construction." His job history showed fairly steady employment work in the construction industry including the Joplin, Missouri Sears projects and work for Dalton Killinger, a well-known union general contractor. He listed three personal references.

Alleged discriminatee Roger A. Hensley applied with Respondent stating that he would perform any position and could start immediately. He listed his skills and training as a carpenter noting that he had attended for 4 years and graduated from "Union Apprentice Classes." Hensley listed three jobs of 5 to 8

<sup>2</sup> Hackenberg's credited testimony that he was instructed to predate his employment application has been taken into consideration. Accordingly, although the application is dated June 25, 1997, Hackenberg testified that he submitted the application on July 3, 1997.

months duration in 1993, 1995 and 1996.<sup>1</sup> He did not list any personal references.

Bob Dale Hurn applied for carpentry work immediately, noting that he was referred by the Union. He listed only “carpentry” in the special skills section. His employment history was very stable. He listed jobs as a carpenter and as a framer and he listed three personal references.

Alleged discriminatee John P. Duncan completed Respondent's employment application on June 30, 1997, stating that he was interested in “Sheetrock Metal Stud” and could begin the following day. He stated that he was a journeyman carpenter with special skills in other specific areas. He listed two past jobs, “Freesen Corp. III” from January to July 1996 and “Danan Corp. Penn” from July to October 1996. Duncan listed a general contractor, a mechanic, and a carpenter as his references. All lived in the southwest Missouri area. Danan built the Sears store at the Joplin, Missouri Mall. Freesen worked on the Highway 71 bridge project—a series of seven bridges in southwest Missouri.

Thomas Earl McFarland applied for “Carpenter any work” immediately for prevailing wage or your carpenters' wages. He listed special skills in tiling and he filled in the names of four companies with no dates indicated in which he worked as an installer. He listed three personal references. His work as an “installer” with special skills in tile and metal would not necessarily rule out general carpentry work, especially if he installed the drywall upon which he installed tile. In any event, among the undated list of employers, including Superior Tile, Zichel, and Fred & Tom's Flooring, another employer, Interior Construction, appears. McFarland listed his position with Interior Construction as an installer. Any ambiguities in McFarland's application could have been resolved with a personal interview. However, Respondent did not afford the alleged discriminatees interviews.

Mike F. Joyce applied for a job as a carpenter stating that he could start immediately. His special skills listed on the application were drywall-studs-concrete work and forms. He completed the application showing fairly steady employment and gave three personal references.

The application of Shelley Rose Williams indicated that she desired carpentry work. She was available immediately and would work at Respondent's wages. Special skills were listed as carpentry and drywall. Four past jobs were listed. Respondent's notes on the application indicate that one of the jobs was a drywall job and one was forms. Three personal references are listed.

Alleged discriminatee Steven Paul Wilson applied for a position with Respondent as a carpenter to start immediately at a negotiable salary rate. He listed special skills as “layout & trim.” He also noted that he had studied civil engineering by correspondence at a community college. Wilson listed three jobs in 1996 and 1997, all left because the jobs were finished, in which he performed as a trim carpenter or millwright. Wilson listed three personal references.

Alleged discriminatee Matthew Allen Rausch completed his

<sup>1</sup> These were Dannon Services (Sears), Artisan Construction, and Midwest Interiors.

application for the position of carpenter noting that he could begin work that day and would like \$15.28 per hour. He stated he was referred by Union Local #978 and completed 4 years of carpentry trade school. His special skills were listed as “metal stud & sheet rock.” He listed steady employment and two personal references.

#### APPENDIX D

Dave Archer began working for Respondent during the payroll period ending July 13 for a rate of \$17.51. Respondent did not require Archer to complete a job application. Stewart explained that Archer worked for one of Respondent's subcontractors, Elite Plastering. When Elite ran out of work in 1996, Stewart hired Archer for a brief time. Archer was rehired in July 1997 and eventually served as foreman on the Carthage Humane Society project which Respondent began in the spring of 1998. Based upon the record, it would appear that Archer performed as a drywall worker when he began working for Respondent in July 1997. In any event, Archer was hired based upon his prior work for one of Respondent's subcontractors and for Respondent. There is no evidence that he was hired based upon a uniform standard or any training relevant to the generally known requirements of the job. Rather, the evidence indicates he had prior experience with Respondent and was rehired based upon that prior experience.

Miguel Argaez was hired after the alleged discriminatees applied for work. Respondent did not have an application for Argaez. Respondent claimed somewhat conflictingly in papers prepared for trial that Argaez was either a helper or a drywall hanger. These documents have been discredited. Stewart explained that Argaez had worked previously for him on a subcontract basis on apartment units hanging drywall. These subcontracts were paid on a lump sum or piece rate basis. Argaez had never been an employee of Respondent's until he appeared on the payroll during the period ending July 13. There is no evidence regarding Argaez' training. There is no evidence of personal references or a satisfactory interview. Apparently, according to Stewart, Argaez had past job experience as a drywall hanger and Stewart was familiar with this experience. The hiring procedures for Argaez do not indicate that a uniform standard was applied.

Enrique Cen was hired under the same circumstances as Argaez. Cen worked for Stewart on a subcontract basis on apartment units. There is no job application for him. Stewart did not testify what Cen's experience was except to say that he was one of the subcontractors on the drywall hanging. I find, as with Argaez, that the hiring procedures were not uniformly applied with regard to Cen.

Vladimir Herrera first appeared on the payroll during the period ending July 13, 1997. Herrera did not complete an employment application. Stewart testified that Herrera was hired under the same circumstances as Argaez and Cen, in that Herrera worked on the apartment complex subcontracts. There is no other evidence regarding Herrera's experience, training, qualifications, work history, or personal references. There is no indication that he was interviewed. I find that the hiring procedures were not uniformly applied with regard to Herrera.

Fabian S. Rivero first appeared on the payroll during the pe-

riod ending July 13, 1997. Rivero did not complete an employment application. Stewart testified that Rivero was a subcontractor, a sheet rock hanger. There is no evidence regarding his experience, qualifications, training, work history, personal reference or interview. I find that the hiring procedures were not uniformly applied with regard to Rivero.

Four individuals named Rucker worked for Respondent during the relevant time period. Two of these individuals, Randy Rucker and Joe Rucker, were employees of Respondent as early as pay period May 25 to June 1, 1997. Accordingly, their hiring is not at issue herein. However, Greg and Steve Rucker first began working for Respondent during pay period July 7 to 13, 1997.

Greg and Steve Rucker dated their employment applications June 3, 1997. As earlier noted, I find that Greg Rucker's application could not have been submitted on June 3, 1997, as dated, because it indicates that Greg Rucker left his prior job in July 1997 and "came to work here!" Similarly, I find that Steve Rucker's application could not have been submitted on June 3, 1997, as dated, because it indicates that Steve Rucker left his prior job in July 1997 while at the same time indicating that he could start work for Respondent "now."

The Ruckers' applications contain such internal inconsistencies regarding the date they completed the applications, that I find it more likely that they completed their applications in early July 1997 just as Hackenberg did. Respondent asserts that in my prior decision I made a specific finding that Greg and Steve Rucker applied for work on June 3, 1997.<sup>1</sup> It is true that I made specific findings that their applications were dated June 3, 1997. However, this does not preclude further consideration of the internal inconsistencies which lead me to discredit that date of application.

Greg Rucker's employment application indicates that he attended 1 year of building trades classes in high school. For special skills, he listed that he built a house. His prior job was as a superintendent for National Specialties for 8 years. He listed drywall and carpentry experience in 1991 and 1992. Greg Rucker's application indicated steady employment. Three personal references were listed. Greg Rucker's drywall experience was somewhat dated and his training was minimal. Respondent did not uniformly apply its stated hiring criteria in hiring Greg Rucker.

Stewart acknowledged that Steve Rucker had absolutely no drywall experience. In fact, Steve Rucker's application indicated that he had previously worked as a cook for Sonic and then as a laborer for National Specialties. Steve Rucker listed three personal references. In any event, as to lack of relevant experience, Stewart testified,

He [Steve Rucker] was getting ready to go into the military and he [Greg Rucker, Steve's uncle] said he [Steve Rucker] would like to work for about two months, period, and that he [Greg Rucker] could try to get a lot of work out of him [Steve Rucker], but he [Steve Rucker] was a good hard worker and

he [Greg Rucker] worked directly with him [Steve Rucker]. And I took Randy [Rucker—Steve's father] and Greg's vouch that they would try to get it for him [Steve Rucker] and that's—I basically hired him [Steve Rucker] because him [Steve Rucker] being his [Randy Rucker's] son and [Greg Rucker's] nephew.

With regard to Steve Rucker, there can be no doubt that Respondent did not adhere to its hiring criteria.

Miguel Varguez (spelled on payroll records as Vargus) first appeared on the payroll during the period ending July 13, 1997. Varguez did not complete an employment application. Stewart testified that Varguez was a subcontractor, a sheet rock hanger, "He's one of the subs that Raphael and Fabian [Rivero] was in charge of, one of the individuals." There is no evidence regarding Varguez' experience, qualifications, training, work history, personal reference or interview. I find that the hiring procedures were not uniformly applied with regard to Varguez.

Michael Williams dated his employment application June 1, 1997, but signed it on July 1, 1997. Williams first appeared on Respondent's payroll during the period ending July 13, 1997. I find that the application was submitted no earlier than July 1, 1997. Williams applied to be a "Carpenter Apprentice," with "open" salary desired and immediate availability. He listed special studies or research work as carpentry, drywall. Williams listed steady employment as a carpenter and laborer with Midwest Drywall (November 1996 to July 1997), Image Building (March to October 1996), and T & K Construction. He listed three personal references. Stewart testified,

Well, I would have talked to him, he—Ron East, he was a close friend to him and Ron vouched for him and I looked through it, but I don't think I specifically saw that he had been working drywall on all the deals and Ron said he worked with him extensively.

Williams' pay (\$17.51 per hour) indicates he was hired as a journeyman carpenter. There is application and interview evidence regarding Williams' specific drywall experience. I find that the hiring procedures were uniformly applied with regard to Williams. I also note that his personal reference, Ron East, "vouched" for him.

Jonathan T. Hackenberg first appeared on Respondent's payroll for the period July 14 to 20, 1997, earning in excess of journeyman carpenter rates. Hackenberg submitted his employment application on July 3, 1997, indicating experience in the construction industry without dates. He listed three personal references. Hackenberg testified that he had contacted Respondent throughout the year and one-half prior to July 1997 attempting to get hired. He was interviewed by Stewart on July 3, 1997, and hired thereafter.

As Stewart explained,

He had contacted me numerous times over the previous year or year and a half prior. At two or three different locations, he'd come on about getting jobs and at the times we weren't hiring or just missed him and he was always working, he worked mostly for Doug Wilson, which I knew Doug. And he'd always kept busy and it always seemed to be wrong—whenever he was busy with Doug, I was busy too or vice

<sup>1</sup> Respondent cites p. 15, L. 10 ("His [Greg Rucker's] most recent experience was listed on his June 3 application as job superintendent.") and p. 15, L. 14 (Steve Rucker also applied on June 3 and began working during the July 7 payroll period.)

versa, so, I never did end up offering him a job until he come in and said he was off and then he filled out an application and he—you know, had been currently employed and I said—he has very good qualifications, been always working steady at drywall and Doug Wlson gave a real high recommendation. He'd always—even Doug stated, he was kept to the last on a job, which that's always your best guys, to the last two or three people on the job when you're closing it out to finish it.

I find that Respondent utilized its hiring procedures, as outlined by Stewart, on a uniform basis with regard to Hackenberg.

Danny Joiner completed an employment application for Respondent on July 14, 1997, and first appeared on the payroll during the period July 13–20, 1997. Joiner was sent by the Union to apply for a job as a covert salt. He did not list any union affiliations. He listed welding as a special skill, indicated steady employment in drywall and carpentry and listed three personal references. Joiner was interviewed by Stewart, who testified,

Danny came in and—he was a friend that had worked around Ron East for quite some time and Danny came in, I talked to him at length, filled out an application. He basically, had really good qualifications, he'd been working at that time and he was—he'd just finished doing a project and was available right then and he said he might have something come up and I said I'd try to put him on over at the other job.

I find that Respondent utilized its hiring procedures, as outlined by Stewart, on a uniform basis with regard to Joiner.

Miguel Garcia began working for Respondent during payroll period July 13–20, 1997. Respondent did not have an applica-

tion for Garcia. Stewart explained that Garcia worked with Arguez and Varguez on a subcontract basis on apartment units. These subcontracts were paid on a lump sum or piece rate basis. Garcia had never been an employee of Respondent's until he appeared on the payroll during the period ending July 13. There is no evidence regarding his qualifications, personal references, work history, or interview. Apparently, according to Stewart, Garcia had past job experience as a drywall hanger and Stewart was familiar with his work. The hiring procedures for Garcia do not indicate that a uniform standard was applied.

During payroll period July 21–27, 1997, Byron Self began working. Self was referred to Respondent by the Union as a covert salt. His employment application, dated February 21, 1997, showed no special skills and minimal job experience without dates. He listed three personal references. Stewart testified,

And Steve and Carl, two of the guys that are still with me, worked with him down there and said he was very good. As a matter of fact, I'd tried to get him over the last year, three or four other times. He'd been doing work on the road and I was never able to connect with him, but he knew that I was trying to get him to go to work back for me at some point and he'd come back in. And of course, those guys—and I worked down there with the guys then and knew that he was a real good hand and so, I hired him.

I find that Respondent did not utilize its standard hiring procedures with regard to Self.